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No. 85-157

OCTOBER TERM, 1985

GARY JACKSON, A/K/A ROE

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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Respondent, the United States of America, has not provided in its brief in opposition to the petition for writ of certiorari any basis for declining review in this case. The government does not dispute the conflict arising in the courts of appeals with respect to the matters raised in regard to the issues which the petitioner submits. While the government attempts to distinguish cases, the government does not dispute the sharp division within the courts of appeals concerning the application of confrontation clause to co-conspirator statements and the applicability of the Compulsory Process Clause to compel the attendance of a co-conspirator who is within the United States. The government does not deny that a similar division and uncertainty exists at the state level as well.

Further, the government does not show any reason to decline review with respect to the question as to whether the constitution or the rules of evidence required a hearing on admissibility of co-conspirator statements. The government makes no showing of an absence of conflict in the numerous reported decisions involving co-conspirator statements. 4 D. Louisell & C. Mueller, *Federal Evidence* §427, at 331 (1980).

Finally, the government shows no rational basis to deny review with respect to whether a defendant is entitled to an

opportunity to testify or to present evidence at a hearing on the admissibility of co-conspirator statements. The government neither distinguishes nor shows any lack of importance of such a critical issue. *See, United States v. Ciampaglia,* 628 F.2d 632, 638 (1st Cir. 1980), *cert. denied,* 449 U.S. 1038 (1980) (recognizing that the preponderance test for admissibility of conspiratorial admissions "implicitly anticipated the defendant's evidence would be taken into consideration"). *See also, United States v. Bell,* 573 F.2d 1040, 1043 (8th Cir. 1978); *United States v. Stanchich,* 550 F.2d. 1294, 1298 (2nd Cir. 1977). Certainly, the importance of the defendant's right to an opportunity to tender such evidence to the court without giving up his right to remain silent and without subjecting himself to cross-examination before the jury has been sufficiently serious and of such substantial importance that this court has deemed it necessary to review such matters. *Cf., Simmons v. United States,* 390 U.S. 377 (1968) (search and seizure issues).

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1. In its brief in opposition, the government contends that the petitioner's Confrontation Clause claim does not concern the *admission* of Preston Jackson's out-of-court statements.[1] Indeed, the government argues, the petitioner's claim solely concerns securing Preston Jackson's presence in court. (Br. in Opp. 8). In this way, the government attempts to distinguish *United States v. Inadi,* 748 F.2d 812 (3rd Cir. 1985), *cert. granted,* No. 84-1580 (1985).

The government intimates in stating its first issue for review (Br. in Opp. I) that petitioner made no objection to the government's offer of the declarations of the absent co-conspirator who had not been shown to be at trial. Later in its brief (Br. in Opp. 8), the government states that in order to

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[1]The Brief for the United States in Opposition to the Petition for Writ of Certiorari is hereinafter cited in abbreviated form as "Br. in Opp."

to raise a Confrontation Clause challenge to the admission of a co-conspirator's statement, the petitioner was required to object expressly on Confrontation Clause grounds at trial. Again, the government intimates that no such objection was made at trial.

Contrary to the government's implication, the petitioner made several objections and used other procedures both prior to and during trial in an effort to preserve the defendant's constitutionally guaranteed right to confront his opposing witnesses. Prior to trial, the petitioner filed a request for an evidentiary preliminary hearing to determine the admissibility of co-conspirator's statements (J.A. 22).[2] The magistrate denied the request. Later, petitioner served upon the government a motion for a bill of particulars seeking, *inter alia,* the names and identities of any persons alleged to have been members of the conspiracy (J.A. 19-20). The petitioner also made a motion *in limine* to exclude statements by persons not specifically alleged to be or charged as co-conspirators in an effort to protect the defendant's right to confrontation. (J.A. 72). The petitioner specifically objected to the admission of statements by Preston Jackson and others on grounds that it would deny his right to confrontation. (J.A. 72, 74). The record clearly shows that the government's attorney, petitioner's counsel and the judge engaged in a lengthy discussion about the proper use of Preston Jackson's out-of-court statements. Petitioner's counsel specifically and continuously objected to the introduction of any out-of-court statements by Preston Jackson stating for the record that Presont Jackson was not unavailable but was "in fact in the custody of the United States" (J.A. 103). Thus, contrary to the claim by the government that petitioner did not object to the admission of Preston Jackson's out-of-court statements, petitioner continuously objected to the *use* and

[2] "J.A." hereinafter appears as the abbreviation for the Joint Appendix in the Court of Appeals.

admissions of any of Preston Jackson's out-of-court statements on the basis of the right to confrontation where the witness had not been shown to be unavailable.

In sum, such actions by the petitioner to discover and then to prevent the admission of Preston Jackson's out-of-court statements on Confrontation Clause grounds places this case in a factually analogous situation to that found in *United States v. Inadi, supra.* The record clearly shows, contrary to the government's claims, that petitioner first tried to exclude the *admission* of Preston's out-of-court statements and, after failing in that attempt, tried to secure the witness' presence.

2. Accordingly, the government incorrectly characterizes the petitioner's claim with respect to the infringement of his Sixth Amendment rights of confrontation and compulsory process. (Br. in Opp. 8-9). The petitioner, at trial, on appeal to the Fourth Circuit, and in his Petition for Certiorari, has raised the contention that his rights of confrontation and compulsory process were denied. This denial arose not only from the failure of the prosecutor and the trial court to require Preston Jackson's presence at trial in order to allow Gary Jackson either to confront him or to introduce any favorable defense evidence, but also from the introduction of Preston Jackson's statements against Gary Jackson as vicarious admissions.

The government asserts in its brief that the prosecutor did not refuse to obtain Preston Lee Jackson's presence at trial. The record shows, however, that the government had Preston Lee Jackson in its custody (J.A. 103), and did not choose to produce Jackson at trial, but decided instead to rely on extra-judicial declarations even though the declarant was available. Additionally, the government's brief incorrectly characterizes the posture of the United States Attorney's office in regard to the defendant's request for assistance in obtaining Preston Lee Jackson. The United States Attorney's

office took the position that it would not assist the petitioner and, in fact, refused to do so, compelling the petitioner to seek a formal order for production of the witness whom the defendant desired to confront.[3]

The Supreme Court, in *Barber v. Page,* 390 U.S. 719 (1968), stated that "a witness is not 'unavailable'. . .unless the prosecutorial authorities have made a good faith effort to obtain his presence at the trial." 390 U.S. at 724-725. The court noted that the State there, as United States here, had made no such effort and that the only reason that the witness was not present to testify in person, was because the State did not attempt to seek his presence. The court rightly noted that "[t]he right to confrontation may not be dispensed with so lightly." 390 U.S. at 725. The court further pointed out that the right to confrontation is basically a trial which includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. 390 U.S. at 725. Neither opportunity was afforded the petitioner, Gary Jackson.

The Court later noted in *Ohio v. Roberts,* 448 U.S. 56 (1980), that the good faith requirement does not require acts in futility by the prosecution. However, the Court did state that "if there is a possibility, albeit remote, that the affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." 448 U.S. at 74.

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[3]During the course of the presentation of evidence, defendant renewed his prior objection to the introduction of the statements of Preston Lee Jackson, who had not been shown to be unavailable. (J.A. 102). Defendant's counsel argued as follows:

> ". . .with respect to confrontation, the right to confront this Preston Lee Jackson. . .[w]e filed a petition for writ of habeas corpus on Friday; on Friday morning we contacted the U.S. Attorney's office and had a discussion in which we were informed that Preston Lee Jackson was in fact in the custody of the United States; we requested their assistance in obtaining the presence of Preston Lee Jackson at this trial; we were informed that it was Mr. McCollough's position that if we wanted Preston Lee Jackson here to confront him, that we would have to file a petition which we did; he is, I understand, at the correctional institution at Memphis, Tennessee, and we do want to preserve our right to confront him." (J.A. 103).

Certainly the possibility of producing the declarant in the present case was neither nill nor remote, but simply the prosecution's option. Such a situation definitely falls under the *Roberts'* requirement of production.

In effect, the conduct of the prosecution constituted a concealment of the witness. The government's failure to disclose the existence of Preston Lee Jackson *as a co-conspirator* until after jury selection, along with its resistance to the request for assistance and to the subsequently filed petition for writ of habeas corpus ad testificandum, constituted a deliberate attempt to make the witness unavailable for confrontation. Certainly, the failure to disclose Preston Jackson's existence as a co-conspirator, the failure to act on the request for assistance to obtain a person incarcerated in a federal prison and the resistance to the application for a formal order for his production are comparable to the deliberation, the negligence and the other acts resulting in a deprivation of witnesses in *Clark v. Blackburn,* 632, F.2d 531 (5th Cir. 1980); *Freeman v. Georgia,* 599 F.2d 65 (5th Cir. 1979); *Lockett v. Blackburn,* 571 F.2d 309 (5th Cir. 1978), *cert. denied,* 439 U.S. 873 (1978), and *Hernandez v. Estelle,* 674 F.2d 313 (5th Cir. 1981), cases the government seeks to distinguish.

Concomitantly, the failure of the government to assist in the production of the witness denied the defendant the opportunity to question the witness for purposes of preserving the record. The defendant was unable to produce the witness in order to confront him and, similarly, was denied compulsory process to obtain the witness in order to place in the record any favorable or exculatory statements.[4]

Relying upon *United States v. Valenzuela-Burnal,* 458

[4]Even if a showing of favorability of the missing testimony would otherwise be required, fundamental fairness dictates where the government's action denies the petitioner the ability to obtain the evidence and to preserve it in the record, the government should not be allowed to benefit from such action or inaction by then arguing that the petitioner cannot predicate prejudicial error upon the inability to obtain the evidence because the absent witness's testimony is not in the record.

U.S. 858 (1982), the government attempts to assert that some stringent standard of materiality and favorability must be met in order for a criminal defendant to establish prejudicial error on compulsory process grounds. However, the court recognized in *Valenzuela-Burnal,* that because the government action "deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess. . . the defendant cannot be expected to render a detailed description of their lost testimony." 458 U.S. at 873.

Additionally, the showing with respect to materiality and favorability required un *Valenzuela-Burnal* has no application in cases such as this, where the witness is within the United States and, indeed, was in the custody of the very branch of the United States Government seeking to prosecute the defendant. The majority opinion in *Valenzuela-Burnal, supra,* clearly recognized that the deportation of an alien witness and the corresponding inability to obtain compulsory process for the deported witness who, of necessity, was outside the United States when the objection to his absence was made, is substantially different from the circumstance in which the witnesses are inside the United States. Indeed, with respect to the requirement of a showing of materiality and favorability where the witnesses are out of the country, the court, "in adopting this standard, . . .expr[ed] *no opinion* on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of *witnesses within the United States,*" 458 U.S. at 873, *n.* 9 (emphasis added).[5]

The government argues additionally that the defendant belatedly filed his application for production of the witness. (Br. in Opp. 10). In contradiction, however, the record shows that the defendant learned of the intention to introduce the statements of Preston Lee Jackson after the jury was selected

[5]Accordingly, review in this case would allow an opportunity for the court to define the standard to be applied in a case where the witnesses were within the United States.

and empaneled on February 22, 1984. (J.A. 69-71, 72). In the statement of facts, the Government's Brief in Opposition to the petition for certiorari acknowledges that, "[a]fter learning that the government intended to introduce the statements of Preston Lee Jackson, who had previously been convicted by the Trial Judge for his participation in the scheme, petitioner also moved for production of statements to be introduced and claimed that failure to furnish them would infringe his Sixth Amendment right to confrontation. (J.A. 80-83)." (Br. in Opp. 6).

When as defense counsel learned that Preston Lee Jackson was "in fact in the custody of the United States" (J.A. 103), the petitioner filed, on Friday, February 24, 1984, a petition for issuance of a writ of habeas corpus ad testificandum seeking the presence of Preston Lee Jackson. All of the defendant's pretrial motions were considered by the trial judge prior to the taking of testimony on the following Monday.

After the trial began on February 27, 1984, "petitioner's counsel again objected to the introduction of Preston's statements and renewed his motion for issuance of the writ." (Br. in Opp. 6). Even if the government's assertion as to timing was correct, such an assertion is not an adequate basis to deny review here.[6]

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[6]The government's argument is circular. The government attacks the defendant's motion and request for issuance of the writ of habeas corpus because, in the government's characterization, the motion stated "in conclusory terms" that Preston Jackson "is a necessary and material witness in this proceding" and that "[t]he [d]efendant . . .cannot proceed to trial in absence of the said witness." (Br. in Opp. 10, *n.* 6 *quoting from* J.A. 50). Yet, the government had the witness in its custody in a federal correctional facility and did not disclose his location until after jury selection. Therefore, the defendant did not have an opportunity to question the witness before filing his application or to produce the witness at trial to insure that his testimony would be placed in the record.

At the time of the filing of the motion, therefore, because of the "position" of the witness and of the government, defense counsel was without an adequate good faith basis to execute an oath or affidavit as to whether the absent declarant's statement was adversarial or exculpatory to defendant. *See, United States v. Valenzuela-Bernal*, 458 U.S. at 874 (stating that the offered testimony should be submitted in verified form attested by defendant or his attorney).

In any event, the defendant was deprived of either his right to confront an adverse witness or his right to compulsory process to produce a favorable witness. It makes no difference under these circumstances whether exculpatory or inculpatory testimony would have been elicited.

3. The government incorrectly analyzes petitioner's argument as to the requirement of a hearing outside of the hearing of the jury on the issue of admissibility of co-conspirator statements and as to petitioner's use of *United States v. James,* 590 F.2d 575 (5th Cir.), *cert. denied,* 442 U.S. 917 (1979), in support of that argument. Petitioner does not rely merely upon the Federal Rules Evidence for the contention that an evidentiary hearing is required before a vicarious admission may be placed in evidence as government contends. Although petitioner urges the court to resolve the conflict among the circuits as to the basis in the evidentiary rules as to whether or not a hearing on the admissibility of co-conspirator statements should be conducted, petitioner does not assert the conflict between *James* and the decisions in other circuits as *the* basis upon which review should be predicated.

While the *James* decision rests upon the Federal Rules of Evidence, petitioner also relies upon a portion of the reasoning in *James* that "co-conspirator's declarations in a conspiracy trial. . . pose problems precisely because [of their materiality] to demonstrate the constitutional implications of the regulation of such evidence. This type of evidence endangers the integrity of the trial because the relevance and apparent probative value of the statements may be...highly prejudicial..." *Id.* at 579 (emphasis added). Accordingly, due process considerations requrie that evidence bearing upon the admissibility of the statements of co-conspirators should be received outside the jury's presence. *Jackson v. Denno,* 378 U.S. 368, 376-77 (1964); *Simms v. Georgia,* 385 U.S. 538, 543-544 (1967).

The government's argument, therefore, shows no reason for denial of review upon these basis. Indeed, this case provides an opportunity to delineate the due process requirements with respect to admissibility of vicarious admissions as well as coerced admissions as in *Jackson.* The government's argument that the prejudicial impact of an involuntary confession heard by the trier of fact is greater than the vicarious

admissions of a co-conspirator is supported neither in logic, by empirical evidence, nor in law. *See, e.g., United States v. James,* 590 F.2d at 579; *Kessler,* "The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back Into the Co-conspirator Rule," 5 Hofstra L. Rev. 77, 79 (1976).

Finally, the government's argument that this case does not present an occasion for the court to determine the type of procedure for the trial court to follow where a defendant wishes to present testimony concerning the admissibility of statements of co-conspirators but to avoid testifying as to such matters in the jury's presence is patently incorrect. Moreover, the government's argument that the defendant did not make a request to do so in the District Court is also patently incorrect. The defendant filed a motion requesting a hearing outside the presence of the jury on the issue of admissibility substantially prior to trial, which the magistrate denied without affording a hearing (J.A. 23) and which the trial court upheld without affording a hearing (J.A. 70, 72).

Accordingly, this court should determine the propriety of either conducting such a requested hearing, which allows the defendant an opportunity to place his evidence before the court without subjecting himself to cross-examination before the jury, or denying that request without affording any opportunity to be heard. *Compare, Simmons v. United States,* 390 U.S. 377 (1968).

CONCLUSION

For these reasons and those set out in the petition, it is respectfully submitted that the petition for writ of certiorari should be granted.

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